IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-607
GEORGE HENSON MIREE, ET AL.
v.
DEKALB COUNTY, GEORGIA, ET AL.

No. 76-659
JUDITH ANITA PHILLIPS
v.
DEKALB COUNTY, GEORGIA, ET AL.

No. 76-700
FIREMAN'S FUND INSURANCE COMPANY
v.
DEKALB COUNTY, GEORGIA, ET AL.

No. 76-722
WILLIAM MICHAEL FIELDS
v.
DEKALB COUNTY, GEORGIA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT DEKALB COUNTY

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BRIEF OF RESPONDENT DEKALB COUNTY

STATEMENT OF THE CASE

A.

INITIAL OBSERVATIONS

Respondent, DEKALB COUNTY, GEORGIA (hereinafter "DeKalb County") files this Brief in response to four (4) Petitions for Writ of Certiorari and subsequently

filed briefs in four (4) separate actions styled as follows: *George Henson Miree, et al.* v. *DeKalb County* No. 76-607 (hereinafter "Miree'); *Judith Anita Phillips,* No. 76-659 (hereinafter "Phillips"); *Fireman's Fund Insurance Company* v. *DeKalb County,* No. 76-700 (hereinafter "Fireman's Fund"); and *William Michael Fields* v. *DeKalb County,* No. 76-722 (hereinafter "Fields").

This Brief will encompass the response of DeKalb County to each of the separately prepared and filed Petitions and subsequently prepared and supporting Briefs. Only a brief perusal of the written argument of the several Petitions will demonstrate a diversity of approach and emphasis on the extensive legal questions presented for this Court's review. Thus, DeKalb County is required, by the complexity and extent of the legal issues before this Court, to prepare a brief fully outlining all of the legal authority available for this Court's consideration.

DeKalb County is not unmindful of the desire of this Court as to the length of written briefs. But, with the limitless approach of the several Petitions coupled with DeKalb County's unawareness of those issues of interest to the Court, it is compelled to prepare an appropriate and somewhat lengthy, reply. However, for ease of reference, DeKalb County will departmentalize its brief by specific headings and arguments.

B.

PROCEEDINGS IN LOWER COURTS

The Petitions presently before this Court arise out of events which occurred on or about February 26, 1973. Each of the actions before this Court was instituted in the United States District Court for the North-

ern District of Georgia, Atlanta Division, against DeKalb County and the United States of America. Each of the initial complaints alleged diversity of citizenship jurisdiction, as it related to DeKalb County. Moreover, the initial complaints, in focusing upon Georgia Law for the creation of the causes of action and remedies, alleged that DeKalb County was liable to the present Petitioners under the legal theories of negligence, nuisance and breach of Federal Grant Agreements to which the Petitioners were alleged third-party intended beneficiaries.

DeKalb County, concurrently with the filing of responsive pleadings, filed Motions to Dismiss each of the present actions. The basis of said Motions was the immunity afforded DeKalb County by the Constitution and Laws of Georgia. The Honorable William C. O'Kelley, United States District Judge granted said Motions in unreported Order dated June 27, 1974 and September 24, 1974. In these unreported opinions, District Judge O'Kelley held that the application of Georgia Law to these diversity actions precluded the present actions under the theories propounded by the initial complaints.

The present Petitioners appealed the entry of judgment to the United States Court of Appeals for the Fifth Circuit. The initial panel comprised of Circuit Judges Godbold, Dyer and Morgan, held in *Miree* v. *United States,* 526 F.2d 679 (5th Cir. 1976), that DeKalb County was afforded immunity from the present actions under the theories of negligence and nuisance. However, that initial panel split over the issue of the rights of the Petitioners as third-party intended beneficiaries of the Federal Grant Agreements in issue. The majority of the initial panel, comprising Circuit

Judges Godbold and Morgan, asserted that Georgia Law applied to the determination of the rights and responsibilities of the Grant Agreements in issue, and that Georgia Law did not protect DeKalb County from suit under the circumstances. Circuit Judge Dyer dissented from the last assertion, pointing out that Federal Law should apply to the interpretation of the Grant Agreements, that Federal Law and the contracts in issue created no rights or remedies for the Petitioners, and that an application of Georgia Law would not change this result. DeKalb County promptly filed a vigorous Motion for Re-Hearing, asserting that under either Georgia or Federal Law, DeKalb County was not liable to the Petitioners herein. A re-hearing en banc was granted, limiting the issues to the third-party intended beneficiary theory, and in *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976), the majority of the Court adopted the previous dissent of Circuit Judge Dyer. The result of this adoptive ruling was an affirmance of District Judge O'Kelley's orders and judgments, dismissing DeKalb County from the present actions.

DeKalb County desires to call this Court's attention to one other occurrence in the Lower Courts. The Miree brief, at p. 42, misleads this Court into believing that DeKalb County is still a party to the present actions in the Lower Court pursuant to cross-claims initiated by the United States. This is clearly incorrect as attached to this Brief, marked Exhibit "A", is a certified copy of an October 12, 1976 Order of District Judge O'Kelley specifically holding that DeKalb County is no longer a party below and not subject to requests for admission. The United States has chosen not to appeal the entry of judgment on behalf of DeKalb County and thus the cross-claims noted above are without present effect.

C.

STATEMENT OF FACTS

The Petitioners have taken diverse approaches to the presentation of a concise factual recitation, ranging from the exhausting narrative contained in the Fireman's Fund Petition and brief to the succinct account depicted in the Miree Petition. Needless to say, DeKalb County does take strong issue with many of the pleaded and conclusory "facts", asserted as true and contained within the various Petitions, particularly the additional "exhibits" attached to the Fireman's Fund brief, which were not part of the Joint Appendix. DeKalb County will not burden the Court or utilize further pagination, to bring the numerous conclusory allegations and unwarranted deductions of fact to the attention of this Court. DeKalb County finds the selective utilization of the "exhibits" contained within the Fireman's Fund brief, apparently beyond the Rules of this Court, to be a clear and unequivocal effort to prejudice this Court with matters beyond the appellate record, and without bearing on the multitude of legal, non-factual, issues before this Court. DeKalb County generally embraces as its factual statement, the factual account contained within the two (2) Orders entered by District Judge William C. O'Kelley, and the factual background set forth by Circuit Judge Morgan, in the initial panel opinion, reported at 526 F.2d 679, at 681.

However, DeKalb County does wish to inform this Court of certain factual aspects of these cases which have heretofore been omitted by Petitioners. First, DeKalb County must take strong issue with the continual suggestion of Petitioners that aviation is the *sole* issue before this Court. Even a brief review of

the diversity complaints in issue will demonstrate that DeKalb County is alleged to have been negligent, to have created a nuisance and to have breached the applicable agreements, by the County's operation of a *sanitary landfill* on County property adjacent to an airport, also resting on County property. Clearly, the central issue in this case is the operation of a *sanitary landfill*, which is obviously a local government function, lacking in any federal consequence except in terms of the environment, not involved herein. The inclusion of exhibits in the Fireman's Fund Brief on the Merits, which were not part of any record before any other Court in this matter, succinctly show that the precise subject matter of these actions is the *sanitary landfill*. In other words, DeKalb County is sought to be held responsible for its *ownership of land*, part of which was dedicated to the DeKalb-Peachtree Airport and on part of which was situated the sanitary landfill in issue.

The factum of the sanitary landfill, and its central focus herein, raise a second point of misconception, promoted by the Petitioners. The Petitioners belabor this Court with the implication that the County was operating all this land as a "business", for alleged "profit", contending that the shield of immunity is thus tarnished. The operation of a sanitary landfill on County property, utilized for the purposes of collection and disposal of waste from the County is, beyond question, a purely local governmental task, beyond any implied claim of waiver of immunity. The operation of the airport in issue, as a secondary aspect to this case, was at a substantial loss to the County in 1971 and 1972 (A-128, 129, 130).

ARGUMENT AND CITATION OF GEORGIA AUTHORITY

I.

INITIAL OBSERVATIONS

DeKalb County believes that certain relevant considerations to this Court's determination have been overlooked to date. The most pertinent of these matters, is the fact that the present actions were instituted in the United States District Court for the Northern District of Georgia, Atlanta Division, upon the basis of diversity of citizenship as it pertains to DeKalb County. (A-9, 107, 138, 257). Thus, the initial plaintiff's sought to invoke Georgia common and statutory Law theories of negligence, nuisance and breach of contract, as well as Georgia statutory remedies for wrongful death, personal injuries and property damage. The Petitioners herein looked to Georgia law to create a private cause of action and a private remedy. This, they were required to do, under *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) *and* for the more salient reasons that in the Federal Aviation enabling legislation, as well as the Federal Regulatory scheme, there are *no* private causes of action or civil remedies explicitly created, particularly in wrongful death actions. *Mounger* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F. Supp. 94 (S.D. N.Y. 1957); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Porter* v. *Southeastern Aviation, Inc.,* 191 F. Supp. 42 (M.D. Tenn. 1961); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d. 1389 (5th Cir. 1970);

McCord v. *Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.* 523 F.2d 332 (3rd Cir. 1975); *Sanz* v. *Renton Aviation, Inc.*, 511 F.2d 1027 (9th Cir. 1975); *Yelinek* v. *Worley*, 284 F. Supp. 679 (E.D. Va. 1968). See also *Cort* v. *Ash* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975).

DeKalb County presents this initial observation because no argument is advanced which denied the existence of governmental immunity under Georgia Law. The arguments advanced by Petitioners seek to avoid or bar the application of the doctrine to the actions presently before this Court. Thus, the initial complaints were filed, seeking all the rights and remedies available under Georgia Law, while attempting to avoid the burdens flowing therefrom. DeKalb County contends that it would be incongruous for this Court to permit the application of Georgia private causes of action and remedies in Georgia Federal Court without recognition of the defenses available to this Respondent, particularly when the Petitioners have sought the application of Georgia Law for the creation of private rights and remedies.

With these initial observations, as to the application of Georgia Law, it is appropriate that this Brief turn its attention to a recounting of applicable Georgia authority.

II.

UNDER THE CONSTITUTION AND STATUTES OF GEORGIA, DEKALB COUNTY IS IMMUNE FROM SUIT IN THE PRESENT ACTIONS

In Georgia, the governmental immunity of a county has its basis *both* in statutory Law (Ga. Code Ann. § 23-1502) and in the Constitution of Georgia (Ga. Code

Ann. § 2-3710, Ga. Laws, 1973, p. 1489, ratified by electorate, 1974 General Election; Ga. Code Ann. § 2-8003).

The statutory basis of the immunity doctrine, as contained in Georgia Code Ann. § 23-1502, clearly and precisely provides as follows:

> "*A county is not liable to suit for any cause of action unless made so by statute.*"

The doctrine of immunity has received recent treatment and review by the Supreme Court of Georgia. Prior to the constitutionalization of the doctrine, the Supreme Court of Georgia in *Crowder* v. *Department of State Parks*, 228 Ga. 436, 185 S.E.2d 908 (1971), *cert. denied*, 406 U.S. 914, 92 S. Ct. 1768, 32 L.Ed.2d 113 (1972), held, as follows:

> "The plaintiff has requested that we review and overrule the full bench decisions of this Court set forth in Division 1 and others recognizing this doctrine of sovereign immunity.
>
> This request requires reference to some events preceding these decisions.
>
> The doctrine of sovereign immunity was imbedded in the Common Law of England at the time of the American Revolution.
>
> Georgia adopted this doctrine by virtue of its adoption of the Common Law of England by Act of General Assembly approved February 25, 1784. (Citations omitted).
>
> In this connection, this Court has held that the common law of force prior to May 14, 1776, was adopted as the law of this State by the act of February 25, 1784, except where modified by statutes or not adjusted to the conditions or system of government existing here. (Citations omitted). We

point out here that the doctrine of sovereign immunity has not been modified by statute.

It does not, we unhesitatingly hold, violate either the State or Federal Constitution.

This doctrine has continued in force in this State since 1784.

Whether it should now be abrogated is a matter of public policy which addresses itself to the Legislative, not the Judicial, branch of our State Government. . . .

We therefore hold that the complaint fails to set forth a claim for relief either in tort, contract or for nuisance.

Thereafter, the 1973 Session of the General Assembly of Georgia, approved an Amendment to the Georgia Constitution (Georgia Acts, 1973, p. 1489), which was ratified by the electorate in November, 1974. This Amendment, appearing as Ga. Code Ann. § 2-3710, establishes a State Court of Claims for resolution of matters against the State or its political subdivision, and expressly reserves the immunity rule for the protection of these governmental bodies. Shortly after the ratification of this Constitutional Amendment, the Supreme Court of Georgia was presented with another immunity attack for claims arising *before* the ratification of the Amendment. In *Sheley* v. *Board of Public Education*, 233 Ga. 487, 212 S.E. 2d 627 (1975), the Georgia Supreme Court held:

"We granted applications for Writs of Certiorari to the Court of Appeals in these two cases for the purpose of reassessing the rule of immunity of the State, its agencies, and subdivisions from liability for tort claims presented in our courts. Regardless of the merits or demerits of the immunity rule, it is conceded that it has existed throughout this State's history except in those situations where it has been eliminated by statutes enacted by the Georgia General Assembly. . . .

. . . we have again reviewed this issue in the context of these two cases and we conclude that, because of the Amendment to the Georgia Constitution proposed by the 1973 General Assembly and ratified by the electorate at the 1974 General Election, changes in the immunity rule, and the extent of such changes and in what circumstances, are now solely within the domain of the General Assembly of Georgia.

Because of the adoption of this Constitutional Amendment, and it is now effective as part of our Constitution, we hold that the immunity rule as it has heretofore existed in this State cannot be abrogated or modified by this Court. The immunity rule now has constitutional status and solutions to the inequitable problems that it has posed and continues to pose must now be effected by the General Assembly . . .

More recently, the Supreme Court of Georgia was presented with an action against Tift County, Georgia, for the alleged slip and fall of a visitor to the county courthouse. In *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E. 2d 445 (1975), the Supreme Court of Georgia was faced with the assertion of governmental immunity and the contention that the doctrine violated applicable provisions of the Georgia and Federal Constitutions. The Georgia Supreme Court rejected the contention that the immunity rule violated either constitution and again affirmed the immunity rule.

As recently as February 9, 1977, the Georgia Supreme Court has again upheld and applied immunity in *Health Facilities Investments, Inc.* v. *Georgia Depart-*

ment of Human Resources, Case No. 31788, 238 Ga. —, — S.E. 2d — (1977), citing from the above-listed decisions and the constitutionalization of the immunity rule.

Clearly, the issues raised by any Due Process or Equal Protection arguments herein have been adjudicated adversely to Petitioners' positions by the Georgia Supreme Court. This Court has consistently upheld the doctrine of governmental immunity; *Palmer* v. *Ohio*, 248 U.S. 32, 39 S. Ct. 16, 63 L. Ed. 108 (1918); In Re: *State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1920), and has particularly viewed the issue as one calling for local determination. *Palmer* v. *Ohio, supra.* The highest court of Georgia has had ample opportunity to abrogate the doctrine of immunity, but has chosen rather to adhere to and strengthen the intent and application of the doctrine. Moreover, it is clear from the above-noted Georgia decisions that the Georgia Judiciary has thoroughly reviewed and weighed the countervailing factors of the immunity rule versus a system of government without immunity. The Georgia courts have chosen to protect the treasury and stability of government and have followed the course of immunity. With the constitutionalization of the immunity rule, at the behest of both the General Assembly of Georgia and the *people* of Georgia, the rule is simply beyond reproach by Georgia courts, and likewise courts construing or applying Georgia Law.

DeKalb County would thus show that even if a proper constitutional attack were lodged in this Court or the trial court, which DeKalb County denies is the case, the above-noted authority plainly supports the doctrine of immunity and its application to the facts presently before this Court.

III.

MUNICIPAL IMMUNITY IS NOT AN ISSUE BEFORE THIS COURT

Several of the Petitions and supporting Briefs make reference to a distinction in the immunity rule afforded to counties and municipalities in Georgia, suggestively alleging that such a refinement violates constitutional provisions. DeKalb County would submit that the recent constitutionalization of the immunity rule, outlined previously in this Brief, may have application to municipal immunity, as well.

However, DeKalb County does admit that the statutory basis for municipality immunity, contained in Georgia Code Ann. § 69-301, does contrast from statutory immunity afforded a county. The basis for the distinctive features and applications in these immunity rules was the subject of the Georgia Supreme Court's opinion in *Troup County Electric Membership Corporation* v. *Georgia Power Company*, 229 Ga. 348, 191 S.E. 2d 33 (1972), wherein that Court held:

> "Counties are subdivisions of the State Government to which the State parcels its duty of governing the people. (Citations omitted). They are local, legal, political subdivisions of the State, created out of its territory, and are arms of the State, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the State. (Citations omitted) . . . On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the Legislature."

Circuit Judge Morgan, in the portion of the initial panel opinion which was adopted by the en banc Court

of Appeals, noted that this distinction "has long been recognized by the Georgia Courts," relying upon decisions such as *Ware County* v. *Cason*, 189 Ga. 78, 5 S.E. 2d 339 (1939), holding a county hospital immune from suit when city hospitals had no such immunity.

Thusly stated, counties were created as "arms of the State" at the local level. Counties must bear the State's burdens within their respective boundaries, while the municipalities, existing within the counties, as legislative creatures, can select from the various powers and duties available at the time of incorporation and reject those liabilities which will either be inapplicable for the particular location or *simply unwanted* by the incorporators who can rely upon the counties. Municipalities can come and go while counties must exist with and carry out the burdens and policies of the State. The distinctive liabilities of each are rational and imbedded in the law, applicable to each and every county in Georgia. Therefore, District Judge O'Kelley and the entire Fifth Circuit Court of Appeals were particularly correct in the determination and application of this distinction, and in the non-application of a multitude of municipality decisions cited by appellants therein and Petitioners herein.

IV.

THE ALLEGATIONS OF NUISANCE FAIL TO STATE A CLAIM UNDER GEORGIA LAW

One of the Petitioners' theories of recovery in the initial complaints was nuisance. As discussed earlier in Brief, the Petitioners' sought to apply a Georgia cause of action for nuisance for two (2) obvious reasons, i.e., the diversity nature of this action and the

lack of a private cause of action or remedy for nuisance in Federal Law. Thus, a review of Georgia authority on this point is appropriate.

It is a clearly established principal of Georgia Law that a county cannot be held liable for damages for a cause of action in nuisance as is presently asserted by the Petitioners herein. *Howard* v. *County of Bibb*, 127 Ga. 291, 56 S.E. 418 (1906); *Sheley* v. *Board of Education*, 132 Ga. App. 314, 208 S.E. 2d 126 (1974), *affirmed*, 233 Ga. 487, 212 S.E. 2d 627 (1975); *Williams* v. *Georgia Power Company*, 233 Ga. 517, 212 S.E. 2d 348 (1975).

DeKalb County would readily admit that authority exists for the maintenance of equitable actions or for actions under the taxing powers or actions for the unconstitutional taking or damaging of property for public purposes. The decisions of *Nalley* v. *Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911) and *DeKalb County* v. *McFarland*, 223 Ga. 196, 154 S.E. 2d 203 (1967), primarily fall in the third category noted above, i.e., taking of property for public purposes, and this was recognized and applied by District Judge O'Kelley and Circuit Judge Morgan [in part two of the initial panel opinion, (526 F.2d 679) adopted by en banc Court of Appeals without dissent, (538 F.2d 643)]. The correctness of this approach is clearly seen from a review of the wrongful death action of *Williams* v. *Georgia Power Company, supra*, wherein the Georgia Supreme Court held:

> "The Appellants argue, however, that the County is liable in this case for the maintenance of a nuisance and relies on the cases of *Nalley* v. *Carroll County*, supra; *DeKalb County* v. *McFarland*, supra, and *Town of Fort Oglethrope* v.

Phillips, 224 Ga. 834, 165 S.E. 2d 141. There is no merit in this contention. The *Nalley* and *McFarland* cases involved nuisances which amounted to takings of property by the counties without paying the owners compensation. The *Phillips* case involved a municipality and not a county."

Moreover, even if a cause of action were available to the Petitioners herein, under a theory of nuisance, Georgia Law would not provide a remedy for wrongful death, personal injury, or for damage to personal property (the airplane) because, in Georgia, the rule appears to be well settled that the measure of damages for any injuries caused by a county's construction of public improvements and other projects is limited to actual depreciation and the market value of any real property affected by the improvements and projects. Thus, in *Howard* v. *County of Bibb, supra,* and *Austin* v. *Augusta Terminal Railroad Company*, 108 Ga. 671, 34 S.E. 852 (1899), the Supreme Court of Georgia held that in an action for the alleged creation and/or maintenance of a nuisance against the county, while damage to land itself was compensable on the theory of unjust taking without payment of adequate compensation, incidental damages flowing from the alleged nuisance were not.

Thus, a review of Georgia Law, sought to be applied by Petitioners herein, evidences that no cause of action or remedy is available to the Petitioners and the dismissal of this theory from the complaints was properly affirmed by the entire Fifth Circuit.

V.

DEKALB COUNTY IS NOT LIABLE IN NEGLIGENCE

The pleadings before this Court alleged that DeKalb County was negligent not in its operation of the DeKalb-Peachtree Airport, but in the County's operation of a sanitary landfill in close proximity to the Airport. Again, it must be noted that Georgia common and statutory Law, not Federal Law, is asserted as the alleged creator of a cause of action and a remedy. However, even a brief review of pertinent Georgia authority establishes that no cause of action or remedy is available against a county upon the theory of negligence. *Ware County* v. *Cason*, 189 Ga. 78, 5 S.E. 2d 339 (1939); *Bates* v. *Madison County*, 32 Ga. App. 370, 123 S.E. 158 (1924) (a county not liable for negligent performance of duty even when duty imposed by statute); *Revels* v *Tift County*, 235 Ga. 333, 219 S.E. 2d 445 (1975).

Specific attention is directed to the fairly recent decision of *Revels* v. *Tift County, supra.* In that case, the Supreme Court of Georgia was confronted with a civil action against Tift County for negligence in the slip and fall of the plaintiff in the county courthouse. The Georgia Supreme Court re-iterated that a negligence action against a county was simply unavailable to the plaintiffs therein, due to the county's unwaived immunity. The Court further disposed of the appellants' contention that immunity was violative of State and Federal Constitutions, by concluding that such a presentation was without merit.

The Petitioners herein have previously relied upon the airport decisions of *Caroway* v. *City of Atlanta*, 85 Ga. App. 792, 70 S.E. 2d 126 (1952); *Taylor* v. *King*,

104 Ga. App. 589, 122 S.E. 2d 265 (1961); *City of Macon* v. *Powell,* 133 Ga. App. 907, 213 S.E. 2d 62 (1975); and *Southern Airways* v. *DeKalb County,* 102 Ga. App. 850, 118 S.E. 2d 234 (1960). None of the above-noted decisions are from the Georgia Supreme Court and three (3) of the decisions involve municipalities, making them inapplicable for this Court's determination. The *Southern Airways* v. *DeKalb County, supra,* decision is factually distinguishable, in that the County leased the entire tract of land constituting the Camp Gordon Airport and a dispute arose over leasehold interest, and that Court simply declared the respective rights of the litigants. This interpretation of that line of alleged authority is consistent with the interpretations rendered by District Judge O'Kelley in the September 24, 1974 Orders, and by Circuit Judge Morgan in Part I of the panel opinion (526 F.2d 679), subsequently adopted, en banc, without dissent, (538 F.2d 643). Moreover, the adoption, by the Georgia General Assembly, of the Uniform Airports Law (UAL) codified as Ga. Code Ann. § 11-201, et seq., not only strengthens, but specifically provides for the immunity of DeKalb County, as follows:

> "Ga. Code Ann. § 11-202. Any lands acquired, or owned, leased, controlled, or occupied by such counties, municipalities, or other political subdivisions, for the purpose or purposes enumerated in § 11-201, shall and are hereby declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes."

Additionally, the framework of UAL provides for civil enforcement by a "political subdivision or agency," (Code § 11-420) and criminal enforcement by the State (Code § 11-9902), but no mention of any private

causes of action or remedies, with Judicial review available only upon exhaustion of administrative remedies. (Code § 11-419).

Thus, the dismissal of the negligence theories contained within the complaints was properly affirmed by the entire Fifth Circuit.

VI.

PETITIONERS BREACH OF CONTRACT THEORY FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Petitioners' theory of a third-party intended beneficiary of the Federal Grant Agreements received substantial and specific review by the Fifth Circuit. The initial panel, cited at 526 F.2d 679, split over this issue, with the majority, composed of Circuit Judges Morgan and Godbold, reviewing Georgia Law and finding that a claim was stated against DeKalb County. Circuit Judge Dyer dissented, 526 F.2d, at 686, suggesting that Federal Law applied and that even if Georgia Law applied, no claim would be stated. DeKalb County petitioned the Court for a re-hearing on this specific issue. The Court granted DeKalb County's Petition and presented counsel with this issue:

> "Whether DeKalb County can be held liable by Plaintiffs as third-party beneficiaries of the contract between Federal Aviation Administration and DeKalb County."

With this issue, the en banc court adopted the dissent of Circuit Judge Dyer. *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976). DeKalb County urges that the position of Circuit Judge Dyer and a majority of the Fifth Circuit is correct, in that, under a review of either Georgia or Federal Law, DeKalb County is not liable.

A.

The Immunity of DeKalb County Is Available in the Present Actions

Previous portions of this Brief have fully informed this Court of the statutory (Ga. Code Ann. § 23-1502) and Constitutional (Ga. Code Ann. § 2-3710) basis of the immunity doctrine. As will be more fully expressed below, the immunity of the County reigns evident in the Petitioners' allegations of third-party intended beneficiaries status.

DeKalb County contends that its immunity from suit is clearly applicable to the facts at bar. *Purser* v. *Dodge County,* 188 Ga. 250, 3 S.E. 2d 574 (1939); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E. 2d 383 (1974); and *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources,* Supreme Court No. 31788, February 9, 1977, 238 Ga. —, — S.E.2d. In *Purser* v. *Dodge County, supra,* the Georgia Supreme Court imposed county governmental immunity upon allegations of third-party beneficiary status. In *Lee* v. *Petty, supra,* the Georgia Court of Appeals found the third-party beneficiary claims "extremely doubtful" under the county immunity rule. In *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources,* the Georgia Supreme Court, had before it allegations that the Appellant therein had *contracted directly* with the State Department of Human Resources (DHR) during 1974 and 1975 to provide "skilled nursing facility services to State medical assistance (Medicaid) patients." A dispute arose over promulgation of certain maximum reimbursement ceilings, and the Appellants therein brought suit, seeking damages for breach and a declaration that the ceilings violated constitutional provisions. The Supreme Court of Georgia,

on February 7, 1977, held that the Complaint of Appellant therein was barred by the immunity of the State. The Georgia Supreme Court noted that the basis for the ruling was the constitutionalization of the Immunity Rule (Ga. Code Ann. § 2-3710) which has been discussed earlier in this Brief.

Clearly, the Immunity Rule now applies to breach of contract actions, even between contracting parties, much less, the strained theory of third-party intended beneficiaries to a contract. The effect of the recent constitutionalization of the Immunity Rule and its application by a Georgia Supreme Court in *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources, supra,* leaves questionable and suspect, though not specifically overruled, a line of prior authority involving permissible actions between a county and a *direct contracting party.* See *Deason* v. *DeKalb County,* 222 Ga. 63, 148 S.E. 2d 414 (1966), relying upon *Decatur County* v. *Praytor, Howton and Wood Contracting Company,* 163 Ga. 929, 137 S.E. 247 (1927). Those decisions have created the Judicial exception that a county can be sued by a contracting party, for a breach of any valid contract which it is authorized by law to make. Assuming, in arguendo, that this line of authority has present validity, Appellants below and Petitioners herein have placed substantial reliance upon this line of authority, urging that DeKalb County no longer has immunity from suit, as it was authorized by statute [Ga. Code Ann. § 11-201 (UAL)] to contract with the Federal Aviation Administration. There is no argument by Petitioners, nor can one be asserted, that the statutory authorization to contract, was itself, a waiver of immunity as the statute further provides that the contract shall be

for "governmental" purposes. Ga. Code Ann. § 11-202. Therefore, the waiver of immunity, if at all, comes not from the enabling statute, but from the act of contracting itself.

Thus, assuming the continued vitality of that line of authority, the issue is precisely drawn: Did the act of contracting by DeKalb County waive its immunity from suit, by those who are not parties to the execution of the contract? The Petitioners reliance upon *Decatur County* v. *Praytor, Howton and Wood Contracting Company, supra,* line of authority is misplaced as those decisions involved suits by *contracting parties not alleged third-party beneficiaries to the contract.* The only remaining decision sought to be applied is that of *Hancock County* v. *Williams,* 230 Ga. 723, 198 S.E. 2d 659 (1973). DeKalb County points out that the sequel to that decision is the more recent Georgia Supreme Court decision in *Williams* v. *Georgia Power,* 233 Ga. 517, 212 S.E. 2d 348 (1975), wherein the Court specifically limited the earlier decision, holding that Hancock County's *"only liability"* was to Georgia Power Company under an express indemnity contract and not to any alleged third-party beneficiaries. Certainly, this result, and inapplicability of the above-noted line of authority, even assuming its present vigor, cannot support the present claims of Petitioners as intended third-party beneficiaries under Georgia Law.

Thus, the inescapable conclusion is that DeKalb County is immune from suit under the Petitioners' theories of third-party intended beneficiaries to the Federal Grant Agreements in issue. This outcome is unaffected by an assertion that the County's immunity was waived by its contracting with a higher governmental authority, i.e., the Federal Aviation Administration. *Purser* v. *Dodge County, supra, Intracoastal Transportation, Inc.* v. *Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973).

B.

Under Georgia Law, the Petitioners Are Not Third-Party Intended Beneficiaries of the Federal Grant Agreements

DeKalb County contends that prior to any determination of the status of the Petitioners herein, this Court must necessarily approach and determine the aforementioned immunity of the County. Assuming, in arguendo, that this Court reaches the issue of the status of the Petitioners herein, then this portion of this Brief will demonstrate that under Georgia Law, the Petitioners are merely incidental to the execution and performance of the Grant Agreements as well as incidental to the contracting governmental authority, i.e., DeKalb County, and as such, have not attained the status of third-party intended beneficiaries.

The initial panel majority opinion (526 F.2d 679), composed of Circuit Judges Morgan and Godbold, correctly held that under Georgia Law a stranger to a contract must be an *intended,* rather than an *incidental,* beneficiary of the contract in order to create or assert a cause of action for breach. 526 F.2d, at 685; Ga. Code Ann. § 3-108; *Steward* v. *Gainesville Glass Company,* 131 Ga. App. 747, 752, 206 S.E. 2d 857 (1974); *affirmed,* 233 Ga. 578, 212 S.E. 2d 377 (1975). With this basis, Circuit Judges Morgan and Godbold found the issue to be "whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public". 526 F.2d, at 685. This initial, two-member majority, found an affirmative response in a line of Georgia Court of Appeals decisions,

headed by the decision in *Smith* v. *Ledbetter Brothers, Inc.*, 111 Ga. App. 238, 141 S.E. 2d 322 (1965).

DeKalb County forcefully disagreed with this incorrect interpretation of Georgia Law and petitioned the remainder of the Court of Appeals for re-hearing on this specific issue. In its Petition, and in its subsequent Briefs, DeKalb County established that in each of the decisions constituting the *Smith* v. *Ledbetter Brothers, Inc., supra,* line of authority, the Georgia Court of Appeals did *not* have a *governmental contracting authority before it.* In each decision constituting that line of authority, *the parties sought to be held responsible was not a governmental authority with some form of immunity, nor was governmental immunity even involved.* Thus, that line of authority was inapplicable therein or herein where the governmental authority with immunity, i.e., DeKalb County, was sought to be held responsible.

DeKalb County presented for that Court's determination and for this Court's review, the decisions of *Purser* v. *Dodge County, supra, McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company,* 118 Ga. App. 582, 164 S.E. 2d 852 (1968); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E. 2d 383 (1974); and more recently *Backus* v. *Chilivis,* 236 Ga. 500, 224 S.E. 2d 370 (1976). Without reciting the particular facts of the first three (3) decisions cited above, it is sufficient to suggest that the involvement of a county governmental authority, cloaked with immunity, was ample basis to deny the existence of the third-party intended beneficiary cause of action. More recently, the Georgia Supreme Court in *Backus* v. *Chilivis, supra,* had before it members of the public who as-

serted the status of third-party intended beneficiaries of a contract between the HL Yoh Company ("Yoh") and Glynn County, Georgia. The Appellants therein, as members of the public, sought to hold Yoh liable for breach of the contract, but the Georgia Supreme Court brushed that argument aside, holding:

> "In order for a third party to have standing to enforce a contract under Ga. Code Ann. § 3-108, it must clearly appear from the contract that it was intended for his benefit. The mere fact that he would benefit from performance of the agreement is not alone sufficient."

In support of the captioned holding, the Court cited *Stewart* v. *Gainesville Glass Company, supra,* and *McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company, Inc., supra.* Of even greater interest, is the suggestion by that Court, in referring to the *Smith* v. *Ledbetter Brothers, supra,* line of authority, that:

> *"Neither of the cases cited by Appellants support the proposition that a citizen can sue one which contracts with a governmental entity for breach of contract."*

Needless to say, the Georgia Supreme Court and Court of Appeals have had at least two (2) recent opportunities to apply the *Smith* v. *Ledbetter Brothers, supra,* line of authority (*Lee* v. *Petty, supra,*) to contracts involving counties and have refused to do so, finding no third-party beneficiary status. Clearly, there was no reason why the Fifth Circuit Court of Appeals and there is no reason why this Court should do otherwise, particularly when governmental immunity of the contracting party is added to the legal equation.

The above-cited authority is consistent with and applicable of the provisions of the Restatement of Contracts, Section 145, which provides, in part:

> "A promissor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all members of the public, is subject to no duty under the contract to such members to give compensation for injurious consequences of performing or attempting to perform it, or failing to do so unless,
>
> (a).
>
> An intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promissor shall compensate members of the public for such injurious consequences . . ."

For the application of this rule in Georgia, see: *Atlanta Gas Light Company* v. *Jennings,* 86 Ga. App. 868, 72 S.E. 2d 35 (1952) (citing *German Alliance Insurance Company* v. *Home Water Supply Company,* 226 U.S. 220, 33 S.Ct. 32, 57 L.Ed. 195 (1912)); *Fowler* v. *Athens City Water Works Company,* 83 Ga. 219, 9 S.E. 673 (1889); *Holloway* v. *Macon Gas Light and Water Company,* 132 Ga. 387, 64 S.E. 330 (1909). Any suggestion, in the Miree brief, that Georgia Law has a "liberal" approach concerning third parties, allegedly at odds with the Restatement Rule, is simply incorrect.

Lastly, DeKalb County asserts that Petitioners are both *incidental* to the contract *formation* and *incidental* to the contract *execution.* It is truly difficult to comprehend how members of the public could be otherwise. Even the suggestion that the class is narrowed to "aeronautical users" changes nothing from the mind-

boggling aspects of members of the public being third-party intended beneficiaries of broad assurances in government contracts. (Petition of Fields, No. 76-722, does not involve "aeronautical users"). As an example, could a "highway user" be a third-party intended beneficiary of an interstate highway construction contract between the United States and the State of Georgia or a political subdivision thereof? No, see *Daye* v. *Pennsylvania,* 483 F.2d 294 (3rd Cir. 1973). The mere fact that a member of the public would have benefited from performance *does not* create third-party intended beneficiary status under Georgia Law. *Stewart* v. *Gainesville Glass Company, supra; Backus* v. *Chilivis, supra.* DeKalb County also asserts that the Petitioners were equally *incidental* to the *contracting governmental party.* Under Georgia Law, it must appear that *both* parties to the contract intended to benefit a third person. *Stewart* v. *Gainesville Glass Company, supra.* None of the Appellants were residents of or taxpayers to DeKalb County. If DeKalb County executed and/or performed a contract for the *intended* not *incidental* benefit of strangers to the County, such an act by the County would be void and a nullity, as an unauthorized act beyond its jurisdiction, and immunity would obtain. See *Purser* v. *Dodge County, supra.* The intention to benefit a stranger would nullify the act of the County while the incidental recipient status would have the third party without a right or remedy against the County under Georgia Law. In either event, the County would not be liable and its dismissal would be proper.

C.

Under Georgia Law, the Petitioners Have No Greater Rights than the Contracting Parties Themselves

If this Court should determine that the governmental immunity of DeKalb County is inapplicable and that the Petitioners are third-party intended beneficiaries of the Federal Grant Agreements, then this Court must approach and determine the extent to which the Petitioners have a cause of action and a remedy for breach.

As discussed in the dissent registered by Judge Dyer, which was subsequently adopted as a majority view, a close review of the Grant Agreements in issue, will establish that the *only* rights accorded the contracting parties, i.e., the Federal Aviation Administration and DeKalb County, are the termination of funds flowing under the Agreements and possible enforcement of performance obligations imposed by the Agreements. See paragraph 2(a) 8(g) of Part I—Offer; paragraph 14 of Part III—Sponsors Assurances. Under common law and Georgia Law principles, the only rights accorded third persons would be those rights held by the contracting parties. As stated by the Court of Appeals of Georgia, in *Deal* v. *Chemical Construction Company,* 99 Ga. App. 413, 417, 108 S.E. 2d 746 (1959):

> "The rights of a third person to sue on a contract made for his benefit depend on the terms of the agreement and are no greater than those granted by the contract as intended by the parties thereto. To recover a beneficiary must bring himself within its terms and construction of the contract is involved. Since recovery on a third person beneficiary contract is a recovery on the contract itself, the right of the beneficiary is no greater than if the contract were enforced between the nominal parties, the beneficiary being in no greater position than the promisee."

Therefore, the rights accorded the parties to the Grant Agreements are simply not sufficient for the alleged third parties herein to maintain the present actions for wrongful death, personal injury and property damage.

VII.

DEKALB COUNTY HAS NOT WAIVED ITS GOVERNMENTAL IMMUNITY

DeKalb County refutes any suggestion that by the purchase of insurance, it has thereby waived its governmental immunity. Clearly, the involvement of an insurer in an action is sufficiently determinative of the outcome to follow State Law. *Nelms* v. *State Farm Mutual Insurance Company,* 463 F.2d 1190 (5th Cir. 1972). This is the only approach available when it is considered that the present actions are diversity actions and that no Federal Law exists on this issue.

In turning to Georgia Law, a brief perusal of the applicable authority will, unquestionably demonstrate, that the purchase of insurance by a county, neither waives the immunity of the county nor creates a direct action against the insurer. *Arnold* v. *Walton,* 205 Ga. 606, 54 S.E. 2d 424 (1949); *Revels* v. *Tift County,* 235 Ga. 333, 335, 219 S.E. 2d 445 (1975). This result was reached by District Judge O'Kelley and affirmed, without the dissent, by the en banc Court of Appeals.

Lastly, DeKalb County asserts that any hint that an implied waiver of immunity has occurred due to the operation of the airport adjacent to the governmental

sanitary landfill must fail in light of § 3-25 of the DeKalb County Code (Airport Rules and Regulations) which provides, as follows:

> "The County assumes no responsibility for loss, injury or damage to persons or property by reasons of fire, water, theft, vandalism, wind, flood, earthquake or collision damage, nor does it assume any liability for injury to persons while on the airport, while using the facilities, or for property damage."

SUMMARY OF ARGUMENT AND CITATION OF GEORGIA AUTHORITY

Under Georgia Law, which is applicable to the present diversity Petitioners, DeKalb County is not liable due to its unwaived immunity. Thus, a review of Georgia Law requires an affirmance of District Judge O'Kelley and the Fifth Circuit Court of Appeals.

ARGUMENT AND CITATION OF FEDERAL AUTHORITY

I.

INITIAL OBSERVATIONS

Initially, DeKalb County must again reiterate that the complaint filed on behalf of Petitioners' herein grounded the jurisdiction of the lower court, upon diversity of citizenship, as it pertained to this Respondent. (A-9, 107, 138, 257). No Federal question was presented in the original complaints, nor do the Petitioners herein suggest the existence of explicit Federal causes of action or Federal remedies for wrongful death, personal injury and property damage. On the contrary, the Complainants sought to invoke Georgia statutory and common law causes of action

for negligence, nuisance and breach of contract, as well as Georgia remedies for wrongful death, personal injury and property damage. DeKalb County raises these aspects of interest because of the Appellate level assertion by Petitioners' herein that this Court should effectively fashion a Federal cause of action and a Federal remedy.

DeKalb County has consistently urged that under either Georgia or Federal Law, it is not liable to Petitioners herein. DeKalb County has preferred the application of Georgia Law, not out of any fear of the suitability of Federal Law to its posture in the present matters, but out of a dutiful respect to the law which is both the creator and protector of it. DeKalb County admits that Federal interests are involved in the disbursement of Federal funds by Federal Grant Agreements, but this is apparently the only interest of Federal Law to the facts at bar. Of course, Petitioners have sounded the alarm of aviation and the supposed application of the Interstate Commerce Clause, but a true reading of the facts before this Court, evidence a matter of purely local involvement and interest, i.e., garbage collection and disposal. Notwithstanding this lack of Federal involvement, DeKalb County will endeavor to detail, for this Court, the profusion of Federal Authority supportive of its position, even under the facts as alleged by Petitioners.

II.

THE IMMUNITY OF DEKALB COUNTY REIGNS EVIDENT IN FEDERAL LAW

A.

The Immunity Afforded DeKalb County Under the Constitution and Statutes of Georgia Is Applicable in Federal Law

The present actions, as they pertain to DeKalb County, have their respective groundwork in diversity of citizenship. Thus, a review of appropriate Georgia authority is mandated. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). DeKalb County, in the previous portions of this Brief, has fully apprised this Court of the immunity afforded DeKalb County, by both the Constitution and Statutes of Georgia.

DeKalb County calls this Court's attention to the fact that three (3) Circuit Courts of Appeals have held the immunity doctrine unimpaired by entry into some sphere of alleged Federal preeminence. *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970); *Intracoastal Transportation, Inc.* v. *Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973); *Red Star Towing and Transportation Company* v. *Department of Transportation of the State of New Jersey*, 423 F.2d 104 (3rd Cir. 1970); and more recently, *Williamson Towing Company, Inc.* v. *Illinois,* 534 F.2d 758 (7th Cir. 1976). In *Rogers* v. *Ray Gardner Flying Service, Inc., supra*, the 5th Circuit Court of Appeals had before it a wrongful death aviation action. Among several holdings relevant herein, the Court, speaking through Circuit Judges Godbold, Simpson and Morgan, held that State sovereignty was unimpaired in the area of aviation. Later, the Fifth Circuit in *Intracoastal Transportation* v. *Decatur County,*

Georgia, supra, with both the State of Georgia and Decatur County, Georgia before it, held that entry into admiralty areas did not subject the defendants to Federal "overlordship". Similar admiralty actions were dismissed due to the effect of immunity in *Red Star Towing and Transportation Company* v. *Department of Transportation of the State of New Jersey, supra,* and *Williamson Towing Company, Inc.* v. *Illinois, supra.*

The reasoning of the above-noted decisions clearly has its cornerstone in the federalism doctrine upon which the Union was created. Though the doctrine of federalism has received less than polite treatment in recent years, it was recently reviewed and re-affirmed, and appropriately applied, in this Court's recent decision in *National League of Cities* v. *Usery,* ——U.S. ——96 S. Ct. ——, 49 L. Ed. 2d 245 (1976). See also *Oregon* v. *Corvallis Sand and Gravel Company,* —— U.S. —— 97 S. Ct. ——, 50 L. Ed. 2d 550 (1977).

Thus, the implied entry of DeKalb County into a Federal sphere of influence in garbage maintenance and/or aviation, does not erase the unwaived immunity of the Respondent. As will be discussed, *infra,* the decision of *Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964), does not affect this result.

B.

The Eleventh Amendment Applies Herein To Afford DeKalb County Immunity

The Eleventh Amendment to the United States Constitution provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

> the United States by citizens of another State or by citizens or subjects of any Foreign State."

The Miree Petitioners, as residents of Alabama, the Phillips Petitioner, as a resident of Tennessee, the Fireman's Fund Petitioner, as a resident of California, and the Fields Petitioner as a resident of North Carolina, all satisfy the "citizens of another State", prerequisite of the Eleventh Amendment. The only other requirement of the Amendment is that the party sought to be held responsible is the State. Admittedly, the State of Georiga has not been made a party to any of the present claims. DeKalb County has previously suggested the impropriety of the Petitioners' failing to name the State, particularly as it related to the alleged unconstitutionality of the Georgia Immunity Doctrine. Moreover, DeKalb County admits that this Court, in a particular set of circumstances and facts, has held that the Eleventh Amendment does not flow to a county, in the older decision in *Lincoln County* v. *Luning,* 133 U.S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890). However, DeKalb County contends that the second requirement of the Eleventh Amendment, i.e., that a state be involved, is discharged when this Court reviews the substantial exposure of the County.

The Miree Petitioners seek $5,500,000.00 in damages for two (2) deaths, the Phillips Petitioner seeks $1,000,000.00 for one (1) death, Fireman's Fund Petitioner seeks over one half million dollars for an assigned hull loss claim, and the Fields Petitioner seeks over $3,000,000.00 for serious personal injuries sustained while being sprayed with flaming aviation fuel. From its place, DeKalb County can inform this Court that the total monetary damages sought by claimants in all of the suits pending in the lower courts,

including those pending in the State Courts, exceed *$37,000,000.00*. From its place, DeKalb County can further inform this Court that its total leviable and attachable budget for fiscal year 1976 is approximately $44,000,000.00. Even the application of minimal insurance coverage, which would be directly at odds with Georgia Supreme Court decisions in *Arnold* v. *Walton,* 205 Ga. 606, 54 S.E. 2d 424 (1949); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E. 2d 445 (1975), would only provide a maximum coverage of $100,000.00 per person. (A-232). Petitioners herein and the parties in interest below, are quite obviously not satisfied with those minimal coverages and will obviously seek to pursue DeKalb County for any excess exposure, which could be as much as $35,000,000.00.

Needless to say, DeKalb County lacks the resources to satisfy such judgments as these, or even judgments as sought only by the present Petitioners. Of necessity, the State of Georgia, by and through its General Assembly, could be called upon by Petitioners herein and parties in interest below, to satisfy the judgments against DeKalb County out of the State Treasury.

This Court, in the fairly recent case of *Edelman* v. *Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), held as follows:

> " . . . it is also well established that even though a state is not named a party to the action, a suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), the Court said:
>
> 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

> to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Id. at 464, 89 L. Ed. 389.
>
> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Company* v. *Reid,* supra; *Kennecott Copper Corporation* v. *State Tax Commissioner,* 327 U.S. 573, 90 L. Ed. 862, 66 S. Ct. 745 (1946)."

See also, *Harris* v. *Tooele County School District,* 471 F.2d 218 (10th Cir. 1973).

Certainly, the above-noted language is precisely applicable to the facts at bar, requiring the intervention of a Federal immunity concept along with the previously discussed State Immunity Rule.

C.

There Has Been No Waiver of the Immunity Afforded DeKalb County

Previous portions of this Brief have dealt with the assertion that DeKalb County waived the immunity afforded it by Georgia Law. A meticulous review of Georgia Law found that assertion to be lacking.

A similar waiver argument is presented by Petitioners herein in the area of Federal Law, with the assertion that DeKalb County has entered into a Federal sphere of influence. DeKalb County is somewhat perplexed with the argument that garbage collection and disposal enters a Federal sphere of influence, but assuming, en arguendo, that it does, Petitioners place almost sole reliance upon this Court's decision in *Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct.

1207, 12 L. Ed. 2d 233 (1964). However, this argument fails to take cognizance of this Court's more recent decisions in *Employees* v. *Missouri,* 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973); and *Edelman* v. *Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Clearly, *Parden* v. *Terminal Railway, supra,* was an F.E.L.A. action with a Congressionally enacted and created Federal cause of action, Federal forum and Federal remedies. From this foundation, a divided Court found a "waiver" of immunity granted a subdivision of the State of Alabama, by its entry into a Federal sphere of influence. As will be discussed more fully in a subsequent portion of this Brief, there is no Congressionally enacted or created Federal cause of action, Federal forum or Federal remedy presently before this Court. A Congressional intention to subject the states and their subdivisions to a waiver of immunity is also completely lacking.

A case with a similar posture was before this Court in *Edelman* v. *Jordan, supra,* where this Court, through Justice Rehnquist, held:

> ". . . we do not think that the answer to the waiver question turns on the distinction between *Parden,* supra, and *Employees,* supra. Both *Parden* and *Employees* involved a Congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Commission,* supra, involved Congressional approval, pursuant to the Compact Clause of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was

found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

But in this case the threshold fact of Congressional authorization to sue a class of defendants which literally includes states is wholly absent. Thus Respondent is not only precluded from relying on this Court's holdings in *Employees,* but on this Court's holdings in *Parden* and *Petty* as well."

Clearly, the *Edelman* v. *Jordan, supra,* approach is applicable to the present case and no waiver of immunity should be found.

One other reason exists for the inapplicability of the *Parden* v. *Terminal Railway, supra,* approach to the present actions. Counsel for DeKalb County has researched every Federal decision citing *Parden* v. *Terminal Railway, supra.* Apparently, no Federal Court, in an *aviation* case, has relied upon the *Parden* v. *Terminal Railway, supra,* approach. Even if this Court should adopt the suggestion of Petitioners that the present actions are, in reality, aviation actions, the *Parden* v. *Terminal Railway, supra,* decision provides no authority or support for their respective positions. Moreover, the previously discussed decision in *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970), does provide an aviation law answer in the negative to the waiver question.

Therefore, a waiver of DeKalb County's immunity has not occurred, and the County is not properly sued.

III.

NO PRIVATE CAUSE OF ACTION OR PRIVATE REMEDY IS AVAILABLE TO PETITIONERS UNDER FEDERAL LAW

It is uncontested that the Federal Legislative and Regulatory scheme surrounding aviation does not explicitly create either a Federal cause of action or a Federal remedy for the Petitioners herein. Thus, the only means by which the present Petitioners can maintain actions based upon Federal Law is for this Court to imply not only a civil cause of action, but a civil remedy, along with the necessary adoption of a Federal forum.

DeKalb County would direct this Court's attention to the fact that numerous Federal Courts have reviewed this specific issue, particularly in some cases involving aviation mishaps causing personal injury and death. *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970); *McCord* v. *Dixie Aviation Corporation,* 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975); *Sanz* v. *Renton Aviation, Inc.,* 511 F.2d 1027 (9th Cir. 1975); *Moungey* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Yelinek* v. *Worley,* 284 F. Supp. 679 (E.D. Va. 1968); *Porter* v. *Southeastern Aviation, Inc.,* 191 F. Supp. 42 (M.D. Tenn. 1961); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F. Supp. 94 (S.D. N.Y. 1957); *Morzingo* v. *Consolidated Construction Company,* 171 F. Supp. 396 (E.D. Va. 1959). *Wolf* v. *Transworld Airlines, Inc.,* 544 F.2d 134 (3rd Cir. 1976);

Rauch v. *United Instruments,* 3rd Cir. (12-30-76, Case No. 76-1184). Each of these decisions stand for the proposition that Federal Courts will not create either a Federal cause of action or a Federal remedy out of the silent legislation and regulatory scheme surrounding aviation. Clearly, these decisions are appropriate precedent for this Court's present determinations.

In response to this line of authority, Petitioners have cited several aviation decisions, wherein, private causes of action and remedies were created. However, none of these decisions involved wrongful death or personal injury actions, but, on the other hand, dealt with some form of discrimination, oversold flights, or noise, none of which is before this Court. The only other supportive authority cited by Petitioners, which does concern personal injuries, or death, are the dual decisions of one Federal District Judge in *Gabel* v. *Hughes Air Corporation,* 350 F. Supp. 612 (C.D. Cal. 1972); and in re *Paris Air Crash,* 399 F. Supp. 732 (C.D. Cal. 1975). DeKalb County is constrained to point out that not one single Federal Court of Appeals has adopted these decisions, and particularly, the Court of Appeals for the Ninth Circuit (the Circuit Court of Appeals for that region) refused to follow the logic of those cases, opting to follow the case of *McCord* v. *Dixie Aviation Corporation, supra.* See *Sanz* v. *Renton Aviation, Inc.,* 511 F.2d 1027 (9th Cir. 1975). DeKalb County would suggest that additional reasons are available not to apply the approach of Judge Hall. Any suggestion of approval of that approach by this Court would literally open the doors of Federal Court to *all* aviation litigants, be they recipients of personal injury or injuries of a different nature, as well as simple contestants to various contractual, lease, bailment,

security interest, etc., arrangements. This Court should take full cognizance of the burden it imposes upon an already overburdened Federal Court by such a determination. Clearly, this is not the intended result of Congress. See 49 U.S.C.A. § 1506.

The above-noted conclusion is fortified by the 1969 introduction in the United States Senate, by Senator Tydings, of Senate Bill Number 961 (S. 961, 91st Cong., 1st Sess.). That Bill sought to create *exclusive* jurisdiction in Federal Courts for aviation matters, create a Federal cause of action, and create a Federal remedy. The Congressional response to this Bill was that it was never reported out of Committee, after substantial hearings. Cited from 51 N.Y.U. LAW REVIEW, 231 at 238. The *factum* of this Congressional response to Senator Tydings' Bill should be sufficient reply to any of Petitioners' suggestions that this Court imply a cause of action and a remedy from the silent legislation.

Assuming, en arguendo, that this Court does not find the Congressional response to the Tydings' Bill persuasive, then a review must be had as to this Court's rulings in *Cort* v. *Ash,* 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). Initially, DeKalb County would note that in *Cort* v. *Ash, supra,* in *Securities Investors Protection Corporation* v. *Barbour,* 421 U.S. 412, 95 S. Ct. 1733, 44 L. Ed. 2d 263 (1975), and in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* 414 U.S. 453, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974), this Court refused to imply or create private causes of action or remedies from silent Federal legislation. The trend created by these decisions is sufficient, in and of itself, to deny such an im-

plication, to the Petitioners herein. But a more specific response is available when viewed in light of this Court's four (4) step test enunciated in *Cort* v. *Ash,* 422 U.S. at 78, 45 L. Ed. 2d, at 36:

> "First, is the Plaintiff one of the class for whose especial benefit the Statute was enacted, (citations omitted)—that is, does the Statute create a Federal right in favor of the Plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (citation omitted.) Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Plaintiff? (citations omitted); and finally, is the cause of action one traditionally relegated the State Law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law? (citations omitted.)"

The Petitioners' efforts to bring themselves within the parameters of these tests have simply failed, particularly Petitioner Fields who was allegedly on the ground at the time of this occurrence. Clearly, none of the Federal legislation or regulations "create a *Federal right* in favor" of the Petitioners, and the first test is thus failed. As for the second test, the Congressional response to the Tydings' Bill evidences an interest to deny a Federal right. The third test has been answered by the numerous Federal Court opinions cited above, while the fourth test is met with the simple fact that the present diversity Petitioners did, in fact, assert their respective claims under State law theories of negligence, nuisance and breach of contract, with State law remedies for punitive damages, wrongful death, personal injury, and property damage being

sought. Moreover, the involvement of a sanitary landfill clearly reserves this area of law for local concern.

Thus, even the application of the *Cort* v. *Ash, supra,* test, leaves the Petitioners without a Federal posture.

IV.

UNDER FEDERAL CONTRACT LAW, THE PETITIONERS ARE NOT THIRD PARTY INTENDED BENEFICIARIES OF THE BROAD ASSURANCES CONTAINED IN THE FEDERAL GRANT AGREEMENTS IN ISSUE

DeKalb County would call this Court's attention to the Restatement of Contracts Section 145, which provides, in part:

> "A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or failing to do so, unless:
>
> (a)
>
> An intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . . "

The majority of the Fifth Circuit, adopting the opinion of Circuit Judge Dyer, relied upon the following decisions as supportive of the Restatement Rule in Federal Contract Law; *West* v. *Morrison Knudsen Company,* 451 F.2d 493 (9th Cir. 1971); *Hensley* v. *United States,* 279 F. Supp. 542 (D. Mont. 1968); *Brotherton* v. *Merritt-Chapman and Scott Corpora-*

tion, 213 F.2d 477 (2nd Cir. 1954); *Johnson* v. *Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963); *Mahler* v. *United States,* 306 F.2d 713 (3rd Cir. 1962); *Housing Corporation of America* v. *United States,* 468 F.2d 922 (Court of Claims, 1972); *Sayre* v. *United States,* 282 F. Supp. 175 (N.D. Ohio 1967). DeKalb County would call this Court's attention to a multitude of similar holdings, including one from this Court, and several of which are recent determinations, as follows: *German Alliance Insurance Company* v. *Home Water Supply Company,* 226 U.S. 220, 33 S. Ct. 32, 57 L. Ed. 195 (1912); *Harlib* v. *Lynn,* 511 F.2d 51 (7th Cir. 1975); *Bogart* v. *United States,* 531 F.2d 988 (Ct. Cl. 1976); *Commonwealth of Pennsylvania* v. *National Association of Flood Insurers,* 378 F. Supp. 1339 (M.D. Pa. 1974), *affirmed* 520 F.2d 11 (3rd Cir. 1975); *McCullough* v. *Redevelopment Authority of Wilkes-Barre,* 522 F.2d 858, 867-868 (3rd Cir. 1975); *King* v. *National Industries, Inc.,* 512 F.2d 29 (6th Cir. 1975); *Goodwin* v. *United States,* 517 F.2d 481 (9th Cir. 1975); *Stanturf* v. *Sipes,* 224 F. Supp. 883 (W.D. Mo. 1963), *affirmed* 335 F.2d 224 (8th Cir. 1964); *Lobianco* v. *Valley Forge Military Academy,* 224 F. Supp. 395 (E.D. Pa. 1963), *affirmed* 331 F.2d 851 (3rd Cir. 1964); *Roberson* v. *United States,* 382 F.2d 714 (9th Cir. 1962); *Hodge* v. *United States,* 310 F. Supp. 1090, 1102 (M.D. Ga. 1969), *affirmed* 424 F.2d 545 (5th Cir. 1970); *United Publishing & Printing Corporation* v. *Horan,* 268 F. Supp. 948 (D. Conn. 1967).

Without burdening this Court with an in depth discussion of each of the above-noted decisions, DeKalb County would particularly cite the decision of *German Alliance Insurance Company* v. *Home Water Supply Company, supra,* wherein this Court had before it a

party who had contracted with a government agency, and this Court held:

> "But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his *direct* benefit." (Emphasis added.)

Clearly, the Restatement Rule was fashioned upon decisions such as this Court's decision in *German Alliance Insurance Company* v. *Home Water Supply Company, supra.* The reason and basis for the Restatement Rule has not changed, nor has or should the rule be changed. Certainly, the concept behind the rule has present vitality as evidenced by the above-noted cases. This approach is very consistent with this Court's recent decision in *United States* v. *Orleans,* — U.S. —, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976), wherein this Court unanimously held that the grantor of Federal funds did not subject itself to "countless unidentifiable classes of beneficiaries" *id,* 48 L. Ed. 2d, at 399. Obviously, if the grantor is not liable to "countless unidentifiable classes of beneficiaries" the grantee of said funds, who itself is cloaked with unwaived governmental immunity, equally is not liable.

With the Restatement Rule clearly in focus and its application herein obvious, the next issue requiring resolution is the status, not standing, of the Petitioners under said Rule. A close review of the Rule demonstrates that, as under Georgia Law, third parties, as members of the public, must demonstrate that both

contracting parties clearly manifested an intention to compensate members of the public for breaches of public contracts. DeKalb County asserts that the Petitioners are both *incidental* to the contract *formation* and *incidental* to the contract *execution*. It is truly difficult to comprehend how members of the public could be otherwise. See *United States* v. *Orleans, supra*. Even the suggestion that the class is narrowed to "aeronautical users" changes nothing from the mind-boggling aspects of members of the public being third-party intended beneficiaries of broad assurances in government contracts. (Petitioner Fields is not an "aeronautical user"). As an example, could a "highway user" be a third party intended beneficiary of an interstate highway construction contract between the United States and the State of Georgia or a political subdivision thereof? No, see *Daye* v. *Pennsylvania*, 483 F.2d 294 (3rd Cir. 1973). Clearly, the mountain of authority cited above denies the Petitioners herein the status, not standing, of asserting that they are intended to be compensated by the grant agreements. The incidental recipient status of the Petitioners is simply insufficient to support the present actions, and they were properly dismissed by the lower courts.

The fact that these appeals allegedly concern aviation and aeronautical users does not change the incidental and unintended status of these third persons. Similar grant agreements were before the Courts in *Eastern Airlines* v. *Town of Islip*, 229 N.Y.S. 2d 117 (1962); *Port of New York Authority* v. *Eastern Airlines, Inc.*, 259 F. Supp. 745 (ED. N.Y. 1966), and *City and County of San Francisco* v *Western Airlines, Inc.*, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962), and those Courts found those aeronautical users were not accorded the status of third party intended beneficiaries under similar grant agreements. The Petitioners' reliance upon *City of Inglewood* v. *City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972), and its progeny, is clearly misplaced.

In that decision, the Plaintiff sought injunctive and declaratory relief based upon an allegedly *continuing breach of an existing grant agreement*. Thus, the issue of *standing* was of paramount interest to that Court, while third-party beneficiaries status was a side-light. Moreover, and of equal importance, that Court cited and distinguished the case of *Port of New York Authority* v. *Eastern Airlines, Inc., supra*, and *City and County of San Francisco* v. *Western Airlines, supra*, finding these cases to involve such aeronautical users as the airlines. While Petitioners righteously contend that they are "aeronautical users" and are thus intended beneficiaries of the grant agreements, they nevertheless cite as supportive authority, a decision which concerns *non-aeronautical users*, and which distinguishes decisions involving aeronautical users. The only other decision cited by the Petitioners suggestively applicable to this area of aeronautical users is *Rapp* v. *Eastern Airlines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967). Again, reliance on that case for the matters presently under consideration is misplaced That decision was without contractual issues and the Port Authority, which may or may not have been immune from suit, was not involved therein. Thus, two of the basic issues before this Court, the immunity of DeKalb County, and contractual issues of third-party intended beneficiary status under the Grant Agreements, were not before that Court. Moreover, whatever other application the *Rapp* decision would have had to the facts at bar, was lost when that decision was vacated on April 1, 1970, by

the United States Court of Appeals for the Third Circuit, by and through Chief Judge Hastie and Circuit Judges Maris and Adams. No doubt other suits arising out of the same occurrence were brought before the Third Circuit, but the issues in those suits were inapplicable to the facts herein.

Outside of the aviation field, the Petitioners rely upon language contained within prior opinions of the Fifth Circuit in *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967) and *Seaboard Airline Railroad* v. *County of Crisp of the State of Georgia,* 280 F.2d 873 (5th Cir. 1960), dealing with school desegregation and Federal Power Regulation, respectively. Generally speaking, citation of those decisions has been limited to their respective areas of involvement, i.e., school desegregation and Federal Power Regulation, and there is no reason to suggest that either of those issues are presently before this Court. Morover, the Fifth Circuit, by not reciting those cases, as authority herein, has obviously drawn a serious shadow over the present validity of those cases, or at least, found their application to be outside the respective areas of interest in these cases.

Therefore, DeKalb County asserts that under Federal Law, the Restatement of Contracts rule obtains, and the Petitioners have failed to demonstrate that the Grant Agreements in issue intended to benefit and compensate them.

Lastly, it must be reiterated that the only rights accorded the contracting parties by the Grant Agreements in issue were the termination of funds flowing under the Agreement and possible enforcement of performance obligations imposed by the Agreements. See paragraph 2(a), 8(g) of Part I-Offer; paragraph

14 of Part III-Sponsors Assurances. Federal Courts have previously recognized that a third-party beneficiary's right of action on a promise cannot rise higher than the rights of a contracting party, *Seward* v. *South Florida Securities,* 96 F.2d 964 (5th Cir. 1938); and that a third-party beneficiary can acquire no better right to enforce the contract than that held by the contracting parties themselves. *Simmons* v. *Western Assurance Company,* 205 F.2d 815 (5th Cir. 1953). The rights accorded the contracting parties herein, are simply not sufficient to maintain the present actions. As such, the creation of causes of action for wrongful death, personal injury and property damage, with unspecific remedies, all out of silent Grant Agreements, would be without basis in law.

SUMMARY OF RELEVANT FEDERAL AUTHORITY

A review of relevant Federal authority demonstrates that the immunity of the County reigns evident in the Federal area. Even if the immunity of the County were drawn into question, there is no private cause of action or remedy available to the Petitioners herein nor do the Grant Agreements in issue provide any relief to the Petitioners.

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FILED IN CLERK'S OFFICE

OCT 12 1976

BEN H. CARTER, CLERK
BY: _____ DEPUTY CLERK

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE BENSON MIREE, et al. vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. 19293
JUDITH ANITA PHILLIPS vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. 19412
FIREMAN'S FUND INSURANCE COMPANY vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. C74-24A
WILLIAM MICHAEL FIELDS vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-291A
MRS. PEARLIE CHAISSON vs. SOUTHEAST MACHINERY, INC.	:	CIVIL NO. C74-915A
MARILYN JOYCE SELLFORS vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-1069A

ATTEST: A TRUE COPY
CERTIFIED THIS
March 8, 1977
Ben H. Carter, Clerk
By: F. Louis Graham
Deputy Clerk

MARY J. HOWARD, et al. vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-1074A
LOCAL PROPERTIES, INC., et al. vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. C74-1272A
WILLIAM MICHAEL FIELDS vs. SEMAC INDUSTRIES, INC.	:	CIVIL NO. C75-218A
MARY J. HOWARD, et al. vs. UNITED STATES OF AMERICA	:	CIVIL NO. C75-320A

ORDER

These actions, companion cases arising from the crash of an airplane at the DeKalb-Peachtree Airport, are presently before the court on DeKalb County's motions for protective orders relieving it of the duty to answer, admit, or otherwise respond to the first and second requests for admissions filed on behalf of Machinery Buyers Corporation, Southeast Machinery, Inc., Semac Industries, Inc., and Fireman's Fund Insurance Company. In support of its motions, DeKalb County contends that under Fed. R. Civ. P. 36, requests for admissions may only be directed to a "party" and that it is no longer a party to any of these lawsuits. The court

agrees. In the only cases in which DeKalb County was originally a party, Miree v. United States, Civil No. 19293; Phillips v. United States, Civil No. 19412; Fields v. United States, Civil No. C74-291A; Fireman's Fund Insurance Co. v. United States, Civil No. C74-24A; Chaisson v. Southeast Machinery, Inc., Civil No. C74-915A, the court, on September 25, 1974, entered final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the cases as to DeKalb County. That judgment has now been affirmed by the Fifth Circuit en banc. Miree v. United States, 538 F.2d 643 (5th Cir. 1976). Since DeKalb County is no longer a "party" to any of these lawsuits, requests for admissions may not properly be addressed to it.

Accordingly, DeKalb County's motions for protective orders are hereby granted.

IT IS SO ORDERED this 8th day of October, 1976.

WILLIAM C. O'KELLEY
United States District Judge